No. 16448

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GREGORIO ARCIAGA MESINA,

Appellant,

vs.

RICHARD C. HOY, District Director of Immigration and Naturalization Service, Department of Justice,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Jurisdiction.

Appellant, plaintiff below, sought to enjoin enforcement of an order of deportation outstanding against him and also sought a declaratory judgment both rendering void another, prior, deportation order executed in 1936 and declaring that appellant is a permanent resident of the United States [R. 10].[1] Judgment in the District Court was rendered in favor of appellee upholding the validity of the deportation order [R. 41]. The Court below had jurisdiction of appellant's action under the provisions of the Declaratory Judgment Act; 28 U. S. C. A., Section 2201, and Section 10 of the Act of June 11, 1946 (Administrative Procedures Act), 60 Stat. 243, 5 U. S. C. A., Section 1009 (*Shaughnessy v. Pedreiro,* 349 U. S. 48 (1955). The judgment of the District Court being a final decision, jurisdiction is conferred upon this Court by 28 U. S. Code, Section 1291.

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[1]"R." refers to the Printed Transcript of Record, "Br." indicates references to appellant's Opening Brief.

Statement of the Case.

Appellant is an alien, a native and citizen of the Philippines [R. 15]. He first entered the United States in 1924 (Br. 1). On June 25, 1935, a warrant of arrest and deportation was issued charging that appellant was deportable in that he was "found managing a house of prostitution, music hall, or other place of amusement where prostitutes gather." [Plaintiff's Exhibit I in evidence, the Certified Administrative Record, with attached Ex. 5]. In February of 1936, the Board of Immigration Appeals upheld appellant's deportability and on February 27, 1936 a warrant of deportation was issued charging that he was deportable under the Act of 1917, in that "he has been found managing a house of prostitution, and has been found receiving, sharing in, or deriving benefits from the earnings of a prostitute." [Certified Administrative Record, Ex. 5]. Appellant was deported on that order to the Philippines on April 18, 1936 [R. 4; Br. 3].

On December 31, 1956, appellant entered the United States at Baltimore, Maryland, as a crewman [R. 5; Deft. Ex. A in evidence]. Prior to his 1956 entry, appellant had made no attempt to obtain the consent of the Attorney General to his applying for admission and had made no application pursuant to Section 212(a)(17) of the Act of June 27, 1952, 66 Stat. 182; 8 U. S. C. A. 1182(a)(17). [R. 5; Br. 2]. Appellant's original "Crewman's Landing Permit" required his departure from the United States on or before January 30, 1957 [Deft. Ex. A in evidence]. This time limit was extended to February 27, 1957 [R. 5].

On January 28, 1957 appellant was granted permission to depart the United States in lieu of deportation, which

he did not do. On June 11, 1957 an Order to Show Cause Re Deportation as a nonimmigrant who remained in the United States longer than permitted was lodged, and on June 28, 1957 a Special Inquiry Officer determined appellant deportable under Section 241(a)(2) of the Act of June 27, 1952, 66 Stat. 204; 8 U. S. C. A. 1251(a)(2). [Certified Administrative Record]. The Order to Show Cause under the present deportation hearing did not contain any charge of deportability under Section 242(f) of the Act of June 27, 1952, 66 Stat. 208; 8 U. S. C. A. 1252(f) entitled "Unlawful Re-entry." [Certified Administrative Record, Ex. 1].

On December 12, 1957 the Board of Immigration Appeals ordered a reopened hearing in order to include the record of the 1935 deportation hearing and on February 17, 1958 the Special Inquiry Officer again found the appellant deportable under the charge in the Order to Show Cause. A deportation order was issued [R. 7, 9; Certified Administrative Record]. This order was confirmed by the Board of Immigration Appeals on August 7, 1958 [R. 9; Certified Administrative Record]. In October 1958, appellant was given the right of voluntary departure which he did not exercise [R. 9; Certified Administrative Record].

On October 16, 1958, appellant filed a Complaint in the Court below seeking to enjoin enforcement of the deportation order outstanding against him and also seeking a declaratory judgment which would render void the deportation order executed in 1936 and declare appellant to be a permanent resident of the United States [R. 10]. The validity of the final order of deportation was upheld in the Judgment of the District Court and the injunction and other relief prayed for by the appellant were denied [R. 41].

Issues Presented.

1. Must appellant be charged as deportable under Section 242(f) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1252(f)) rather than Section 241(a)(2) of the Act of 1952 [8 U. S. C. 1251(a)(2)] because of the fact that he was previously deported?

2. Is appellant entitled to have the administrative record of his first deportation reviewed in this action when that deportation has long since been executed?

3. Assuming, solely for the purpose of argument, that the 1936 deportation order is subject to attack in this proceeding, do the 1935-1936 proceedings reflect a gross miscarriage of justice?

Statutes and Regulations Involved.

Section 101 of the Immigration and Nationality Act of 1952, 66 Stat. 166, 8 U. S. C. A., Section 1101, insofar as is pertinent to this proceeding, provides:

"(a) As used in this chapter—

* * * * * * * *

"(15) The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * * * * *

"(D) an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a

crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

* * * * * * * *

"(g) For the purposes of this chapter any alien ordered deported (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed."

Section 212(a)(17) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U. S. C. A. Section 1182(a)(17) provides:

"(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * * * * *

"(17) Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this chapter or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 1252(b) of this title, unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission;"

Section 241(a) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U. S. C. A. Section 1251(a), insofar as is pertinent to this proceeding, provides:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * * * * *

"(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

* * * * * * * *

"(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status;

"(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 1182(a) of this title; or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;"

Section 242 of the Immigration and Nationality Act of 1952, 66 Stat. 208, 8 U. S. C. A. Section 1252, insofar as is pertinent to this proceeding, provides:

"Penalty for willful failure to depart; suspension of sentence

(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of section 1251 (a) of this title, . . .

* * * * * * * *

"Unlawful reentry

(f) Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, or any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation."

Section 252 of the Immigration and Nationality Act of 1952, 66 Stat. 220, 8 U. S. C. A. Section 1282, insofar as is pertinent to this proceeding, provides:

"(a) No alien crewman shall be permitted to land temporarily in the United States except as provided in this section and sections 1182 (d) (3), (5) and 1283 of this title. If an immigration officer finds upon examination that an alien crewmen is a nonimmigrant under paragraph (15) (d) of section 1101 (a) of this title and is otherwise admissible and has agreed to accept such permit, he may, in his discretion, grant the crewman a conditional permit to

land temporarily pursuant to regulations prescribed by the Attorney General, subject to revocation in subsequent proceedings as provided in subsection (b) of this section, and for a periof of time, in any event, not to exceed—

* * * * * * * *

"(2) twenty-nine days, if the immigration officer is satisfied that the crewman intends to depart, within the period for which he is permitted to land, on a vessel or aircraft other than the one on which he arrived."

8 C. F. R. Section 242.6 (1958) provides:

"§ 242.6 Aliens deportable under section 242 (f) of the act. In the case of an alien within the purview of section 242 (f) of the act, the order to show cause shall charge him with deportability only under section 242 (f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section."

8 C. F. R. Section 242.22 (b) (1958) provides:

"(b) Deportability. In determining the deportability of an alien alleged to be within the purview of § 242.6, the issues shall be limited solely to a determination of the identity of the respondent, i. e., whether the respondent is in fact an alien who was previously deported, or who departed while an order of deportation was outstanding; whether the respondent was previously deported as a member of any of the classes described in paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a) of the act and whether respondent unlawfully reentered the United States."

ARGUMENT.

I.

There Is No Compulsion to Proceed Under Section 242(f) Because It Is a Procedural Section Only, Not a Substantive One, and the Only Substantive Basis for Deportation Is Under Section 241(a)(2)(9).

Appellant contends that the "only appropriate charge" on the record in the present case is under Section 242 (f) of the Act of 1952 [8 U. S. C. 1252 (f)], charging unlawful re-entry after a previous lawful deportation, which previous order should be reinstated. The deportation order here is based on Section 241 (a) (2) (9) and charges appellant as an alien crewman who was admitted as a non-immigrant and failed to comply with the conditions of such status by overstaying the 29 days leave or extension thereof.

Appellant cites *United States ex rel. Blankenstein v. Shaughnessy,* 112 Fed. Supp. 607 (S. D. N. Y. 1953) in support of his contention.

Appellee submits that the *Blankenstein* case is clear authority to the contrary. In that case, which was a habeas corpus proceeding, the relator urged, as does the appellant here, that Section 242 (f) was the "sole and exclusive" remedy for deporting him and that deportation proceedings "ab initio" were unauthorized. The basis for this contention was a deportation order for Blankenstein which had been issued in 1924, followed in 1930 by his departure from the United States. The warrant of arrest in the *Blankenstein* case is similar to the order to show cause in the present case in that there was no reference to Section 242 (f), deportability having been charged un-

der Section 241 (a) of the 1952 Act alone. (112 Fed. Supp. at p. 611).) As in the present appellant's case the prior warrant of deportation had been based upon one of the grounds described in subsection (e) of Section 242 of the Act of 1952 (*Ibid* at p. 610); the ground involving appellant is stated in Section 241 (a) (12) of the Act of 1952.

The relator's contentions in the *Blankenstein* case were refuted on the basis that until the Attorney General, pursuant to Section 242 (f) has made certain specific findings, after notice of this charge to the alien and a hearing thereon, there is no reinstatement of the previous order of deportation (*Ibid.* at p. 610). The last of the three findings required, as noted in the quote on page 4 of appellant's opening brief is that the alien "had unlawfully re-entered." There was no such finding in the present case. See 8 C. F. R., Section 242.22 (b).

The "semblance of plausibility" given to the appellant's argument by Section 242.6 of the Regulations and to that of the relator in the *Blankenstein* case by former section 242.71, in that "an alien within the purview of Section 242 (f)" shall be charged in the order to show cause "only under Section (f)," was dismissed by the New York district court as an erroneous evaluation of Section 242 (f) as a "substantive provision, rather than an enforcement one which comes into play only subsequent to a finding of deportability." (*Ibid.* at pp. 610-611).

The view taken in the *Blankenstein* case concerning the nature of Section 242 (f) of the Act of 1952 [8 U. S. C. 1252 (f)] was also taken in *De Souza v. Barber,* 263 F. 2d 470 (9th Cir. 1959) cert denied, 359 U. S. 989, 3 L. Ed. 978, 79 S. Ct. 1118 (1959). The *De Souza*

case involved an appeal from an order denying a writ of habeas corpus and an appellant who had previously been deported. The appellant in that case had re-entered the United States without a visa and as a result of a hearing on an order to show cause, the previous order of deportation was reinstated in accordance with Section 242 (f) of the Act of 1952. [8 U. S. C. 1252 (f)]. In answering the appellant's contentions of error in that the trial court had refused to review the earlier, 1929, deportation proceedings, it was stated as follows:

> "[1-3] Under these facts, when appellant entered the United States on June 29, 1957, he was a deportable alien within the meaning of 8 U.S.C.A. § 1251 (a) (1), by reason of his lack of a visa or other document permitting entry. This is the basic and substantive ground of deportation. While the warrant recites that deportation was pursuant to 'Sec. 242 (f) of the Immigration and Nationality Act' (8 U. S. C. A. § 1252 (f) for unlawful reentry after having been deported, this section is a procedural and enforcement provision. A hearing was held pursuant to this section and relevant regulations, and the required findings were made with respect to appellant's identity, prior deportation as a member of a class described in 8 U. S. C. A. §1251 (a) (4), and his unlawful re-entry. On the basis of such findings the order for deportation was properly reinstated pursuant to section 1252 (f). But, as Judge Weinfeld said in United States ex rel. Blankenstein v. Shaughnessy, D.C., 112 F. Supp. 607, 610, 611, 'the ground of deportability of an alien who illegally reentered after a prior final order of deportation is predicated not upon § 242 (f) (8 U. S.

> C. A. 1252 (f)), but upon § 241 (a) (1) (1251 (a) (1)) of the Act.' There was a full compliance with the applicable statutes and regulations." (263 F. 2d at p. 474).

Thus, even where there has been compliance with all of the necessary procedural requirements for a reinstatement of a prior order of deportation, the substantive basis for deportation remains one of the grounds enumerated in Section 241 (a) of the 1952 Act [8 U. S. C. 1251 (a)].

The substantive provision relied upon by the appellee in the present case is Section 241 (a) (2) [8 U. S. C. 1251 (a) (2)] quoted herein. Appellant is clearly in violation of Section 241 (a) (9) [8 U. S. C. 1251 (a) (9)] as one who was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to comply with the conditions of any such status. Exhibit A in the record on appeal which contains the "Crewman's Landing Permit" indicates the findings of the immigration officer at Baltimore, Maryland, pursuant to Section 252 (a) of the Act of 1952 [8 U. S. C. 1282 (a)], that appellant was a nonimmigrant under 8 U. S. C. A. 1101 (a) (15) (D). That appellant fulfilled the definition of a nonimmigrant alien crewman stated in the latter subsection is borne out by the facts; whether he had also been the subject of a previous deportation and had not applied for permission to apply for readmission under Section 212 (a) (17) of the Act of 1952 [8 U. S. C. 1182 (a) (17)] is not material in view of the "basic and substantive" grounds for deportation under 8 U. S. C. A. 1251 (a) (2).

That an alien crewman who overstays his permitted time in the United States and abandons his status as a nonimmigrant is subject to deportation on that ground is well established in the law.

Philippides v. Day, 283 U. S. 48, 75 L. Ed. 833, 51 S. Ct. 358 (1931);

Foundoulis v. Lehmann, 255 F. 2d 104 (6th Cir. 1958);

Delany v. Moraitis, 136 F. 2d 129 (4th Cir. 1943);

United States ex rel. Rios v. Day, 24 F. 2d 654 (2d Cir. 1928), cert. denied 277 U. S. 604, 72 L. Ed. 1011, 48 S. Ct. 601 (1928);

United States ex rel. Anderson v. Karnuth, 46 F. 2d 689 (W. D. N. Y. 1930).

II.

Appellant Is Not Entitled to Have the Administrative Record of His First Deportation Reviewed in This Action When That Deportation Has Long Since Been Executed.

The appellant in *De Souza v. Barber,* 263 F. 2d 470 (9th Cir. 1959), cited *supra,* was attempting to obtain a review of deportation proceedings held in 1929 pursuant to which he had been deported. The 1957 deportation proceedings had resulted in a reinstatement of the previous deportation order. In denying the appellant's contention that the refusal to review the 1929 hearings had constituted error in the trial court, it was stated in the opinion of the circuit court as follows:

> "[4] Appellant's entire case is based upon alleged infirmities in the deportation order in 1930. As the trial judge well said, 'The petitioner would have this court disinter his first deportation order which was issued in 1930 and examine the evidence

on which it was based.' Yet for a period of more than 26 years, between his deportation in 1930 and entry in 1957, appellant did not seek any review of the order of deportation or question its validity. He did not seek permission for entry from the Attorney General under either sections 1182 (a) (17) or 1181 (b). He did not seek lawful entry under sections 1182 or 1226. Under these circumstances the order of deportation of 1930 is not subject to collateral attack in this proceeding.

This conclusion is strengthened by 8 U. S. C. A. § 1101 (g): 'For the purposes of this chapter any alien ordered deported (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.' In our opinion appellant must be 'considered to have been deported in pursuance of law.' particularly in view of the long period of acquiescence in the deportation order." (263 F. 2d at pp. 474-75).

The statement in the *De Souza* case can be applied without change, save for a change in the dates, to the present case. The appellant in the instant case bases his entire case upon alleged infirmities in the 1936 order. No review was sought on the appellant's behalf for a period of more than 20 years, nor was the validity of the order questioned. There was no attempt by the appellant to avail himself of the provisions of sections 1182, 1181 or 1226. The order of deportation of 1936 should not here be any more subject to collateral attack than was the 1930 order in the *De Souza* case; the provisions of 8 U. S. C. A. 1101 (g) are no less applicable.

III.

Assuming, Solely for the Purpose of Argument, That the 1936 Deportation Order Is Subject to Attack in This Proceeding, There Is No Indication of a Gross Miscarriage of Justice in the 1935-1936 Proceedings.

An attempt was made in *United States ex rel. Steffner v. Carmichael,* 183 F. 2d 19 (5th Cir. 1950) cert. denied, 340 U. S. 829, 95 L. Ed. 609, 71 S. Ct. 67 (1950), to collaterally attack a previous order of deportation. In disallowing such an attack it was stated in the opinion as follows:

> "[1] Where an alien has been deported from the United States pursuant to a warrant of deportation, we do not think it permissible to allow a collateral attack on the previous deportation order in a subsequent deportation proceeding, unless we are convinced that there was a gross miscarriage of justice in the former proceedings. There are numerous cases where aliens have been deported several times, and if in each subsequent case the validity of the previous deportation order had to be determined, there would be no end to the proceedings cast upon administrative agencies." (183 F. 2d at p. 20).

It is submitted that, considered as a whole, the record of the 1935-1936 proceedings involving appellant, as contained in Exhibit 5 attached to the Certified Administrative Record, most clearly does not indicate a gross miscarriage of justice. See also *Daskaloff v. Zurbrick,* 103 F. 2d 579 (6th Cir. 1939).

It is immaterial whether or not appellant in 1936 was a national or a person subject to deportation as though

he were an alien, because the previous deportation order was executed without appeal and there is no dispute that appellant at this time is an alien who entered as a crewman and has overstayed his time, and is therefore deportable under Section 241 (a) (2) (9) *supra.*

Assuming, solely for the purpose of argument, that appellant's status in 1936 is subject to present examination, the treatment, at that time, of the appellee as an alien for immigration purposes was valid.

In a part of the Act of March 24, 1934 providing for the independence of the Philippine Islands, ch. 84, Section 8, 48 Stat. 462, formerly 48 U. S. C. (1934 Ed.), Section 1238, the status of citizens of the Philippine Islands was defined as follows:

> "(1) For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13 (c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. . . ."

By its terms the Act was not effective until accepted by the Philippine people; such acceptance occurred on May 1, 1934.

Cabebe v. Acheson, 183 F. 2d 795 (9th Cir. 1950).

These specific provisions continued in force until July 4, 1946 when the Philippines achieved full independence (*Ibid* at p. 795).

The warrant of arrest and deportation involved in appellant's original deportation was issued on June 25, 1935, over one year after Section 8 of the Act of 1934 (48 U. S. C. (1934 Ed.), Section 1238) became effective. The record of the 1935-1936 proceedings indicates that the activities for which appellant was deported continued well beyond May 1, 1934, assuming, arguendo, that such a continuation would be necessary. (Page 5 of the Report of Hearing contained in Exhibit 5 attached to the Certified Administrative Record; pages 1 and 2 of the statement under oath by Marta Caraballo made on August 21, 1935 and contained in Exhibit 5 of the C. A. R.; page 1 of the sworn statement of Maria Perez, made on August 8, 1938 and contained in Exhibit 5 of the C. A. R.)

Section 8 of the Independence Act (48 U. S. C. (1934 Ed.) Section 1238)) was the law when appellant was originally deported. It cannot be contended that the interpretation of the law between 1934 and 1946 indicated by appellant's original deportation was not the correct interpretation. Even if the interpretation during that period were, at present, deemed incorrect, a change in interpretation would not allow a reopening of the 1935-1936 proceedings. As stated in *United States ex rel. Steffner v. Carmichael,* 183 F. 2d, 19, 20 (5th Cir. 1950)

> ". . . If it were true that a change in the interpretation of the law applicable to a cause prosecuted to judgment entitled the party who had been affected by such change to reopen the controversy, lawsuits would not be settled with finality. . . ."

Conclusion.

It is respectfully submitted that the judgment of the District Court upholding the validity of the deportation order and denying the relief prayed for in the Appellant's Complaint, should be affirmed.

Respectfully submitted,

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